RECEIVED
SUPREME COURT
STATE OF WASHINGTON
10 APR -9 PM 3:31
BY RONALD R. CARPENTER
CLERK

NO. 84243-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FEDERAL WAY SCHOOL DISTRICT

Respondent,

vs.

DAVID VINSON,

Petitioner.

APPEAL FROM KING COUNTY SUPERIOR COURT NO. 08-2-05374-1 KNT
COURT OF APPEALS NO. 61752-4-I (DIVISION I)

REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW

VAN SICLEN, STOCKS, & FIRKINS
Tyler K. Firkins
Attorneys for Petitioner
721 45th St NE
Auburn, WA 98002-1381
(253) 859-8899
e-mail: tfirkins@vansiclen.com

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Washington Statutes

Washington Court Rules

I. INTRODUCTION

In an impressive about-face, the Federal Way School District ("District" hereafter) now claims that the case of *Federal Way School Dist. 210 v. Vinson,* 154 Wn. App. 220, 234, 225 P.3d 379, 383 (2010), "raises no broader issues of general public importance, and therefore is inappropriate for review by the Supreme Court." District's Answer at page 2. And yet in its argument, which was adopted by the Court of Appeals, the District convinced the court to review an otherwise moot case because the "matter is one of continuing and substantial public importance" *Vinson,* 154 Wn. App. at 234, 225 P.3d at 383 (citing *Westerman v. Cary*, 125 Wn.2d 277, 892 P.2d 1067 (1994)). Thus, in the District's view, a case that was once worthy of review, despite the fact that it was moot, has become an inane decision limited to the specific facts presented. Despite the District's flexibility on the importance of the case, the *Vinson* court itself held that this case is one of substantial public importance. The fact that the case was wrongly decided amplifies its importance and the need for review by this Court.

The *Vinson* opinion creates a radical new legal standard that entirely ignores the unappealed factual finding that David Vinson's conduct "did not and would not have an adverse impact upon his teaching effectiveness or performance." *Vinson*, 154 Wn. App. at 226. Instead, the Court of Appeals imposes a system whereby a subsequent court may substitute its views for those of the hearing officer and the superior court,

thereby rendering both levels of review entirely superfluous.

This Court needs to accept review to clarify a system that has become all too ambiguous. The rule now being employed is as follows:

> When the cause for dismissal is based on the employee's job performance, **either one or both** of the *Clarke*[1] tests **may** apply. But application of these tests **may or may not** require consideration of **some or all** of the *Hoagland* factors. In contrast, when... a[n] employee's status or conduct outside his job duties is the basis for discharge, the *Hoagland*[2] factors must be considered, along with the second *Clarke* test.

Vinson at 230 (quoting *Ruchert v. Freeman Sch. District*, 106 Wn. App. 203, 213, 22 P.2d 841 (2001) (emphasis added). From this quote, the *Vinson* court concludes that the second *Clarke* test should apply in David Vinson's case without resort to the *Hoagland* factors because his alleged conduct involved workplace performance issues. The Court made this conclusion as a matter of law. *See Vinson* at 230. Yet, if David's conduct involves workplace performance as opposed to off site conduct or his status, then the most the *Ruchert* case says is that **"one or both"** of the *Clarke* tests **"may"** apply and that the *Hoagland* factors **"may or may not"** apply. In *Vinson*, no explanation is given as to how the court eliminated the first *Clarke* test or decided that it was error for the hearing officer to apply the *Hoagland* factors. Far from creating a clear and

---

[1] *Clarke v. Shoreline Sch. Dist. No. 412,* 106 Wn.2d 102, 113-14, 720 P.2d 793 (1986).

[2] *Hoagland v. Mount Vernon School Dist. No. 320*, 95 Wn.2d 424, 426, 623 P.2d 1156, 1157 (1981).

unambiguous rule, the *Vinson* Court adopts an indefinite standard from which no real guidance can be taken.

Moreover, the *Vinson* opinion converts a legislatively created system that provides for a prompt (as little as ten days) and inexpensive method of resolving teacher employment disputes, into a judicially-mandated marathon of appeals where a District's resources can be used to overwhelm a financially vulnerable teacher.

This Court must accept review to create clarity, resolve whether the District is even entitled to appeal, and to state the standard of review if the District is permitted to appeal by way of extraordinary writ.

II. ARGUMENT

This Court should accept review because the opinion in *Federal Way School Dist. 210 v. Vinson,* 154 Wn. App. 220, 234, 225 P.3d 379, 383 (2010) conflicts with this Court's precedent with respect to its interpretation of the sufficient cause standard and the role of the hearing officer. This Court needs to create clarity where now only ambiguity exists. *Vinson* also conflicts with this Court's prior precedent as to whether the District may appeal the hearing officer's decision. Finally, this Court needs to accept review because the issues presented are matters of substantial public importance, as admitted by both the District and the *Vinson* court.

A. The Decision in *Federal Way v. Vinson* alters Supreme Court precedent, undermining the purpose of RCW 28A.405.310.

The District first argues that review is unnecessary because the *Vinson* court does not alter this Court's decision in *Clarke v. Shoreline Sch. Dist. No. 412,* 106 Wn.2d 102, 113-14, 720 P.2d 793 (1986). However, a cursory review demonstrates this argument to be untrue. Initially, the District accurately quotes from *Clarke*, wherein this Court stated:

> Read together, the general rule emanating from Washington case law is this: Sufficient cause for a teacher's discharge exists as a matter of law where the teacher's deficiency is unremediable and (1) materially and substantially affects the teacher's performance, (citations omitted), *or* (2) lacks any positive educational aspect or legitimate professional purpose. (citations omitted). In such cases, the teacher is deemed to have materially breached his promise to teach, and can be discharged without compliance with the probation procedures of RCW 28A.67.065.

Clarke, 106 Wn.2d 102, 113-114, 720 P.2d 793, 800 (emphasis in original). Now compare *Clarke* as written to the punctuation employed by the *Vinson* court. That court states:

> Specifically, sufficient cause for a teacher's discharge exists as a matter of law where the teacher's deficiency is unremediable and materially and substantially affects the teacher's performance, *or* lacks any positive educational aspect or legitimate professional purpose.

Vinson at 229 (citing *Clarke* at 106 Wn.2d 113-114)(emphasis in original). The first change by the *Vinson* court was to delete the numbers set forth in the *Clarke* quote. This alteration is critical because it assists the court in eliminating the remediability aspect of the test altogether. By eliminating

the parenthetical numbers, the positioning of the word "and" then applies only to the first test, and is entirely omitted from the second test. Thus, under the former test, one would have to first establish that the teacher's deficiency is unremediable and then, in addition would have to establish *either* (1) that the deficiency materially and substantially affects the teacher's performance *or* (2) lacks any positive educational aspect or legitimate professional purpose. Under the *Vinson* court's version of the test, a teacher could be discharged merely on a finding that the teacher's deficiency lacks any positive educational aspect or legitimate professional purpose.

The result is a test that is meaningless because no teacher can ever demonstrate that even minor misconduct serves a legitimate professional purpose. The question should instead be whether the conduct is significant enough to destroy a teacher's career. The standard created by *Vinson* can only be achieved by altering this Court's actual ruling in *Clarke*. Division I therefore alters the punctuation to create a totally new test, without expressly stating that it is doing so.

Beyond altering the punctuation and meaning of *Clarke*, the court in *Vinson* ignores the holding of *Clarke*, taken as a whole. Additional aspects of *Clarke* are important to understand the content and context of this Court's decision. As an example, in *Clarke*, this Court also noted:

> In this case, a deficiency constituting a hazard to the safety and welfare of Clarke's students would be sufficient cause for discharge as a matter of law if the deficiency materially

> and substantially affected Clarke's performance, *see Hoagland,* at 428, 623 P.2d 1156, such that Clarke can be deemed to have materially breached his promise to teach. *See Barnes v. Seattle Sch. Dist. 1,* 88 Wn.2d 483, 487, 563 P.2d 199 (1977). In determining whether Clarke's deficiency materially and substantially affected his performance, we believe the eight factors articulated in *Hoagland* should be considered.

Clarke, 106 Wn.2d at 115, 720 P.2d at 801. *Clarke* involved workplace deficiencies, just as in *Vinson. Id* at 230 ("Because the misconduct here took place at work, on work time, and in violation of his duties as a District employee..."). Yet, the court in *Vinson* utilizes a completely different test than the *Clarke* court. *Vinson* applies the second numbered test, while the *Clarke* court applied the first numbered test, together with the *Hoagland* factors pertaining to workplace deficiencies. No explanation is given by the *Vinson* court as to why it chose the second test.

In fact, this Court in *Clarke* seemed to suggest that the second test is usually reserved for the type of case that involves abusive or outrageous conduct by a teacher. This Court stated:

> Similarly, the Court of Appeals has upheld teacher dismissals where the conduct at issue lacked "any positive educational aspect or legitimate professional purpose." *Pryse v. Yakima Sch. Dist. 7,* 30 Wn. App. 16, 24, 632 P.2d 60 (1981); *Potter v. Kalama Pub. Sch. Dist. 402,* 31 Wn. App. 838, 842, 644 P.2d 1229 (1982). This court recently has observed that, "in some instances, teacher misconduct can be so egregious that the sufficient cause determination can be made as a matter of law." *Mott v. Endicott Sch. Dist. 308,* 105 Wn. 2d 199, 203, 713 P.2d 98 (1986).

Clarke at 113. The cases cited by the court above involve physical abuse and sexual grooming behaviors by teachers—egregious and unlawful

behavior. Such conduct suggests a test more akin to a strict liability analysis, where the hearing is required to determine whether the conduct actually took place.

However, where facts exist like those presented in this case, or in a case like *Clarke*, the question should be whether the misconduct is sufficiently bad that the teacher should be discharged. In these circumstances, this Court suggests that the first test should be applied, in addition to applying the *Hoagland* factors.

In footnote 9, the *Vinson* court suggests the flaw in its own decision. The Court states:

> Further, to read *Weems* as the District suggests would eviscerate the line of cases since *Hoagland* and *Clarke* which ensure that the circumstances of a teacher's conduct may be taken into consideration when a district seeks discharge.

Vinson at 230, n 9. More precisely, the *Vinson* opinion eviscerates this Court's rulings in *Clarke* and *Hoagland* wherein this Court sought to create a system that would preclude teachers from being improvidently discharged, as in the *Hoagland* case, *Hoagland,* 95 Wn.2d at 426, and would take into consideration the circumstances surrounding the teacher's conduct. *Id; and Clarke* at 113.

Strangely, as if trying to prove the teacher's point, the District argues, "Because the misconduct occurred at work and in the performance of Vinson's duties as a public employee, settled and uncontroverted precedent makes clear that it was error for the Hearing Officer to apply the

Hoagland factors." Answer at 13. And yet not a single case cited by the District holds anything of the kind. The opposite is true. In *Clarke*, a case involving workplace performance issues, this Court not only applied the first *Clarke* test, but also applied the *Hoagland* factors. The District can hardly coherently argue that it was error for the Hearing officer to apply the *Hoagland* factors when this Court ruled it was appropriate to do so in *Clarke*. This is nothing more than looking glass logic. It is bizarre, and emanates from the profound ambiguities in Division I cases that seek to alter this Court's precedent. This Court must accept review to correct and clarify these issues.

More risibly, the District asserts in its Answer that the employee raises the issue of remediability for the first time on appeal. The District fails to point out that this petition is the employee's first appeal. Previously, the employee had prevailed at the hearing officer level. The employee prevailed yet again when the superior court denied the District's application for a writ. Under such circumstances, the employee previously had no standing to assert any request for relief, as he was not aggrieved by any decision. Only upon receiving the erroneous Division I ruling did the employee ever have standing to assert any basis for relief. It is therefore absurd to argue that the employee has waived his right to address the issue.

In summary, this Court should accept review so that it can take back its decision. *Clarke* and *Hoagland* were not intended to create the

ability to terminate all teachers as a matter of law on a routine basis. Instead, *Hoagland* and *Clarke* were intended to create a framework for courts to review appeals that are permitted by law. Except in cases involving outrageous behavior, such as physical or sexual abuse of students, the hearing officer is afforded broad discretion as the statute suggests to determine the issue of sufficient cause. However, teaching effectiveness should always be at the forefront of teacher discharge cases. Because the District did not appeal the finding of fact that David's Vinson's teaching effectiveness or performance were unaffected by his conduct, David should prevail as a matter of law. Instead, by distorting this Court's opinions, the decision in *Vinson* has ruled that David should be dismissed as a matter of law, even though his conduct would not affect his teaching effectiveness or performance. This Court must accept review.

B. The *Kelso* Decision was erroneously decided and conflicts with prior Supreme Court precedent.

The District attempts to distinguish this Court's ruling in *State ex rel Bates v. Board of Industrial Insurance Appeals*, 51 Wn.2d 125, 316 P.2d 467 (1957), by asserting two arguments. First, the District asserts that the legislature did not explicitly rewrite an already clear statute to overrule the court of appeals decision in *Kelso School Dist. No. 453 v. Howell,* 27 Wn. App. 698, 700-701, 621 P.2d 162, 164 (1980). Second, the District contends that *Bates* is distinguishable because the statute is unique. Both of these arguments are fatally flawed.

The District's first argument ignores the fact that the legislature is presumably aware of this Court's decision in *Bates*. If it is aware of that decision, the legislature must be presumed to be aware of the conflict between *Bates* and *Kelso*. And yet the legislature has not overturned *Bates*.

More fundamentally, to presume that the legislature will both notice and immediately move to overturn every instance of judicial activism in which a court has ruled contrary to its will, is absurd. The District's construction improperly places a presumption of legislative acquiesce before the rules of statutory construction.

The District's second argument is equally unavailing. Simply arguing that the worker's compensation system is unique does nothing to explain why the Court's ruling in *Bates* is inapplicable. Indeed, most statutes are unique, and the teacher discharge statutes are no different. The statutory system created by the legislature fundamentally altered the prior system, wherein decision making power was mostly left to school boards. Such a system was seen as unfair. Instead, the legislature set up a swift and inexpensive system that employs a separate hearing officer. As part of that system, the legislature specifically omitted the District's right to appeal. Such a policy determination creates a level playing field where a District cannot overpower teachers with unlimited state resources, as in this case.

Judge Dwyer, in his dissent, was correct to quote this Court, which stated:

> Since the legislature saw fit... to withhold from the department any right to appeal from the decisions of the board, it follows that, in the absence of some legislative expression indicating a contrary intention, the superior court had no jurisdiction to entertain and grant an application for certiorari which would, in effect, permit the department to do precisely what the legislature has said it may not do, to wit, obtain a review of the board's decision by the superior court.

Bates, 51 Wn.2d at 131-132. Earlier in the opinion, the court stated:

> It is entirely possible that the omission of any provision giving the department a right to appeal to the superior court was intentional on the part of the legislature, and the presumption, of course, is that it was intentional.

Bates, 51 Wn.2d at 130; *see also*, *Hatfield v. Greco*, 87 Wn.2d at 781 ("[W]hen the language of a statute is clear, there is no room for construction.").

RCW 28A.405.340 does not permit a school district to file an appeal of an adverse hearing officer's decision. Suggesting that the concept of legislative acquiescence should replace the clear language of a statute turns our judicial system upside down. The District presents no convincing argument against Judge Dwyer's dissent.

This Court should accept review to determine whether the *Kelso* decision was correctly decided or whether the legislative system that was actually enacted should prevail.

C. The *Vinson* court applied a standard of review that was remarkably lax and unsupported by case law.

The *Vinson* majority substituted its view of sufficient cause for that of both the hearing officer and the superior court. In so doing, the court created a standard of review, "error of law", unsupported by statute or case law. Indeed, the error of law standard applied by the *Vinson* majority was more lax than that required to be demonstrated by an appealing teacher under RCW 28A.405.320, and less demanding than the standard suggested by the Federal Way School District on appeal. This Court should accept review to clarify the standard of review to be applied with respect to the judicially-created right of appeal now enjoyed by school districts.

In its answer, the District pronounces as dispositive the case of *Coupeville School Dist. No. 204 v. Vivian*, 36 Wn. App. 728, 738, 677 P.2d 192, 197-198 (1984). This is an interesting argument by the District in that *Coupeville* makes a number of significant rulings. As an example, *Coupeville* declares:

> The foregoing are the facts found by the hearing officer as well as those pertinent parts which are uncontroverted in the record. We turn now to the *ultimate question of fact, whether Vivian's acts as determined by the hearing officer, coupled with those facts which were not in controversy, constitute sufficient cause for discharge.* In most cases, because the statutes do not stipulate certain grounds as per se grounds for dismissal, ***it will be a question of fact whether the complained of acts constitute sufficient cause.*** (citation omitted).

Coupeville, 36 Wn. App. at 739, 677 P.2d at 198 (emphasis added). Thus, according to the case relied upon by the District, sufficient cause is a

factual finding. Since the District failed to denominate any findings as erroneous, all of the findings are verities on appeal, including, according to *Coupeville*, the finding of sufficient cause. The case concludes with the quote:

> We conclude that if all factors are considered, including Vivian's misconduct and its impact on his teaching ability, the School District conclusively established both the misconduct and its material and substantial effect upon his future performance. The ***decision of the hearing officer was arbitrary and capricious*** and an error of law.

Coupeville, at 739. The decision does not say whether the error of law standard or arbitrary and capricious was dispositive. The District assumes the error of law standard was sufficient to support the holding in and of itself. But the decision does not expressly state that an error of law, standing by itself, would have been sufficient. The *Coupeville* case, if anything, indicates confusion as to the appropriate standard to apply. If *Coupeville* is correct, and "sufficient cause" in the context of a writ is a question of fact, than an error of law standard would be wholly incorrect.

Moreover, the District fails to explain why the District can simply meet an error of law standard when appealing by extraordinary statutory writ, while according to *Clarke*, a teacher appealing as a matter of right must meet a higher standard. *Clarke*, 106 Wn.2d at 110. At the very least, and as a matter of fundamental fairness, a school district should not have a more favorable standard of review on appeal than what a teacher must demonstrate. This is particularly true when the District should not have

the right of appeal in the first instance, and must instead resort to a request for extraordinary relief under a writ. Yet an error of law standard of review is not extraordinary at all. It appears to be the most lax standard that can be applied.

To say that these matters have become more clear in the years since *Clarke* and *Hoagland* would, under any honest recapitulation, be a misstatement. The various interpretations are so strained at this point that courts are just making up standards of review, as in *Coupeville*. This Court must accept review to provide needed clarity with respect to this case, which Division One admits is a matter of substantial public importance.

III. CONCLUSION

Review should be accepted in this case because under RAP 13.4(b), considerations 1, 2, and 4 apply.

DATED this the 9th day of April, 2010

VAN SICLEN, STOCKS & FIRKINS

Tyler K. Firkins, WSBA 20964
Attorney for the Petitioners
Van Siclen, Stocks & Firkins
721 45th Street N.E.
Auburn, WA 98002
(253) 859-8899
Tfirkins@vansiclen.com

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
10 APR -9 PM 3:32
BY RONALD R. CARPENTER

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

1. I am employed by the law offices of Van Siclen, Stocks & Firkins.

2. On April 9, 2010, I caused to be served a true and correct copy of the Petition for Review on the following via ABC Legal Messenger:

Jeffrey Ganson
Dionne & Rorick
601 Union St., Ste. 900
Seattle, WA 98101

DATED this 9th day of April, 2010 at Auburn, Washington.

Diana M. Butler